IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LINDA DRUMMOND,	:	CIVIL ACTION
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	:	
Plaintiff	:	
	:	NO. 05-5378
v.	:	
	:	
	:	
PHILADELPHIA GAS WORKS,	:	
	:	
Defendant	:	

MEMORANDUM

Baylson, J. **March 14, 2007**

I. Introduction

Linda Drummond ("Plaintiff" or "Drummond") alleges that her former employer, Philadelphia Gas Works ("Defendant" or "PGW"), violated Title VII, the Pennsylvania Human Relations Act ("PHRA"), and the Philadelphia Fair Practices Ordinance ("PFPO"), by denying her a promotion and later firing her because of her race. She also claims PGW retaliated against her for engaging in protected activity in violation of Title 7 and the PHRA, and that she was harassed and subjected to a hostile work environment.[1] Defendant filed a Motion for Summary Judgment on August 18, 2006. After briefing, oral argument was held on February 27, 2007, and

[1] Plaintiff's complaint also included claims of negligent and intentional infliction of emotional distress, as well as defamation, libel and slander per se. The Court dismissed these claims in a November 28, 2005 Order.

the parties were permitted to file post-argument briefs. For the reasons set forth below, the Court will grant PGW summary judgment on all claims.

II. Factual Background

Drummond is a forty-six year old, African American female. She began working for PGW on November 11, 1992 as a clerk typist. She was promoted to supervisor of customer affairs on April 14, 2001, but was demoted from that position in February 2003 because she signed a transmittal sheet indicating certain checks had been turned over to an armored car, when in fact they had not. On June 14, 2003, Drummond was assigned to work in PGW's Universal Services Department, as administrator of the CARES Program (a customer information and referral service).

Cristina Coltro, a forty-five year old Hispanic female, was Plaintiff's supervisor in the Universal Services Department. In Coltro's first written performance evaluation of Plaintiff, Coltro assigned Drummond an overall performance rating of two on a five-point scale: "[an] employee whose performance does not consistently meet expectations." (Ex. KK). Coltro explained that Drummond needed to improve her communication and decision making skills, as well as her ability to interact with others and assume responsibility for her work. In an effort to address these problems, Coltro placed Drummond on a ninety-day Performance Improvement Plan ("PIP") in January 2004. Under the plan, Coltro would reappraise Plaintiff's performance on a monthly basis.

Two days after being placed on the plan, Drummond applied for a promotion to Universal Services Supervisor. Drummond was tested and interviewed for the position, but it was ultimately awarded to Elsa Leung, a twenty-nine year old, Asian co-worker, whose overall scores

were higher. As Universal Services Supervisor, Leung became Drummond's immediate supervisor.

In her 30 and 60 day assessments of Drummond's performance, Coltro indicated that Drummond was "making progress." In her 90-day evaluation, she again noted Drummond was progressing, but stressed that:

> certain conduct improvements are still expected. At times, Linda's behavior is defensive and confrontational, particularly with her superiors. She reacts negatively when questioned about her work and displays a poor attitude when criticisms are made. She often confuses critique with persecution. This attitude, unless improved, thwarts work growth.

(Ex. W). In light of these concerns, Coltro recommended (and Human Resources approved) a 30-day extension of Drummond's PIP on May 3, 2004. Shortly thereafter, Drummond filed a written response to this evaluation, expressing her belief that she was "experiencing racist intentions." (Ex. X). On May 6, 2004, she filed a written complaint with PGW's Equal Employment Opportunity (EEO) office, alleging "racial discrimination, mental harassment, and bias intentions." (Ex. G). Drummond met with PGW's Human Resources Manager, Gary Gioioso, on May 13, 2004 to discuss her complaint. She also filed a formal complaint of discrimination with the Philadelphia Commission on Human Relations ("PCHR") on May 28, 2004, which was forwarded to the EEOC for "dual filing purposes."

On June 7, 2004, Coltro completed Drummond's 120-day reassessment, and concluded she was "not making progress." Coltro explained:

> Despite all efforts through the performance improvement plan, Ms. Drummond's behavior in the department has not improved since the last assessment. She continues to be insubordinate and confrontational with her supervisors.
> . . .

> Despite the meetings that occurred, Ms. Drummond has not demonstrated willingness to improve. Once again she showed insubordination towards her supervisor and falsely accused her of not providing [a] response on a particular request.
> . . .
>
> From the time Ms. Drummond was placed in this department she has displayed [a] poor attitude. Despite all efforts through the performance improvement plan, conversations I had with her, and meetings with representatives from the HR department, Ms. Drummond refuses to change her attitude and continues showing disregard for her department, insubordination and disrespect towards her supervisors. Additionally, Ms. Drummond's attendance record is poor and has hindered her workload at times.

(Ex. Y). Coltro recommended Drummond "be removed from her job as the CARES Administrator without further delay."

On June 9, 2004, Gary Gioioso responded to Plaintiff's internal complaint in writing. After his May 13 meeting with Drummond, Gioioso interviewed Jacqueline Fulton and Sonya McClees (the two witnesses Drummond identified as being able to corroborate her allegations), and found that "[n]either one could support [her] claims." (Ex. H). Gioioso further explained that the Universal Services Supervisor position was awarded to Elsa Leung because she was the "best qualified candidate," and "[i]n no way did ... race and/or color factor into that decision." (Id.). With regard to Drummond's performance evaluations, Gioioso noted that Coltro and Leung had the responsibility of supervising her work, and created the performance improvement plan to "provide clear, concise information on areas of ... performance that need improvement" - not because of racial animus. (Id.). Gioioso concluded there was no "evidence of racial discrimination and or harassment." (Id.).

Two days later, Drummond was terminated "based on [her] failure to improve [her] performance as outlined in [her] Performance Improvement Plan." (Ex. I).

III. Legal Standard

The burden-shifting analysis established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), is the appropriate analysis for summary judgment motions in cases alleging employment discrimination and retaliation.[2] Plaintiff must first prove by a preponderance of the evidence that a prima facie case of unlawful discrimination or retaliation exists. See Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994); Fogleman v. Mercy Hosp., Inc., 283 F.3d 561, 567-68 (3d Cir. 2002). If the plaintiff establishes a prima facie case, the burden shifts to the defendant to offer a legitimate, non-discriminatory reason for the adverse employment action. See Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 254-56 (1981). The defendant satisfies its burden of production by introducing evidence, which, if taken as true, would permit the conclusion that there was a nondiscriminatory reason for the unfavorable employment decision. Fuentes, 32 F.3d at 763. The defendant need not prove that the tendered reason actually motivated its behavior because the ultimate burden of proving intentional discrimination always rests with the plaintiff. Id.

If the defendant comes forward with a legitimate, non-discriminatory reason for its action, the plaintiff can defeat a motion for summary judgment by proffering evidence from which a fact finder could reasonably either (1) disbelieve the defendant's articulated legitimate reasons, or (2) believe that an invidious discriminatory reason was more likely than not a motivating or

[2] The McDonnell Douglas framework also applies to Plaintiff's claims under the PHRA and PFPO. See Tomasso v. Boeing Co., 445 F.3d 702, 704 (3d Cir. 2006) (PHRA); Joseph v. Cont'l Airlines, Inc., 126 F.Supp.2d 373, 376 n.3 (E.D. Pa. 2000) (PFPO).

determinative cause of the defendant's action. Id. at 764. To discredit the defendant's proffered reason, the plaintiff cannot simply show that the defendant's decision was wrong or mistaken, since the factual dispute is whether discriminatory animus motivated the defendant's actions. Id. at 765. A plaintiff's disagreement with an employer's evaluation of his performance does not show pretext. See Billet v. CIGNA Corp., 940 F.2d 812, 825 (3d Cir. 1991) *overruled in part on other grounds*, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); see also Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509 (3d Cir. 1993), cert. denied, 510 U.S. 826 (1993) (pretext turns on the qualifications and criteria identified by the employer, not the categories the plaintiff considers important).

IV. Discussion

A. Racial Discrimination

1. Failure to Promote

Plaintiff contends that PGW failed to promote her to Universal Services Supervisor because of her race. In "failure to promote" cases, a plaintiff must establish that she: (1) belongs to a protected class; (2) applied for and was qualified for an available position; (3) was rejected; and (4) after the rejection, the position remained open, and the employer continued to seek applications from persons of plaintiff's qualifications. Bray v. Marriott Hotels, 110 F.3d 986, 990 (3d Cir. 1997). Defendant does not dispute that Plaintiff has established a prima facie case, and Plaintiff concedes that PGW has provided a legitimate, non-discriminatory reason for its decision to promote Ms. Leung instead of Ms. Drummond.[3] The only issue, then, is whether

[3] Plaintiff, an African American female, applied for the position of Universal Services Supervisor on January 30, 2004. Defendant does not claim that Plaintiff, who had twelve years

Plaintiff has pointed to sufficient evidence of pretext to defeat summary judgment. She has not.

Plaintiff claims there was ample "evidence of [racial] animus between her and Ms. Coltro." (Plaintiff's Br. 9). This "evidence" consists of Drummond's allegations that Coltro gave her mean, "smirky" looks; frequently "put down" Drummond in Leung's presence, but praised Leung in Drummond's presence; "nitpicked" Drummond's work; and "harassed" her about mistakes. Before the promotion was awarded, Coltro mentioned the new position in a meeting, and said to Leung, "You and I have already spoken about this." (Drummond Dep., Apr. 5, 2006 at 15-16). Coltro then looked at Drummond with a "smirky, angry expression." (Drummond Dep., Apr. 3, 2006 at 58). Plaintiff submits her own deposition testimony and affidavit in support of these allegations. Although Drummond claims "other Black employees ... believed that Ms. Coltro was biased against Blacks", the only two employees she named, Sonya McClees and Jacqueline Fulton, submitted affidavits stating they do not believe Coltro or Leung are racist, and have never seen them treat black people in an offensive or demeaning manner. (Ex. BB, Ex. CC).

Drummond's unsupported and conclusory allegations of discrimination do not create a triable issue of fact. See Jalil v. Avdel Corp., 873 F.2d 701, 707 (3d Cir. 1989) (dismissing claim of national origin discrimination because it was based on "nothing more than mere allegations of discrimination"). Plaintiff has presented nothing, other than personal conjecture, that would permit a trier of fact to disbelieve PGW's asserted reason for denying Drummond the promotion,

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of experience with PGW, was unqualified for the position. On March 4, 2004, PGW rejected Plaintiff's application and, two days later, awarded the promotion to Plaintiff's co-worker, Elsa Leung. PGW claims Leung was promoted because she received the highest overall score on the written examination and interview.

or suggest that discrimination was more likely than not the motivating factor. Although Plaintiff believes she was more qualified for the promotion than Leung, the Court "must look only at the perception of the decision maker, not the plaintiff's own view of his performance." Andy v. United Parcel Serv., Inc., No.Civ.A. 02-8231, 2003 WL 22697194, at *6 (E.D. Pa. Oct. 28, 2003). "The fact that an employee disagrees with an employer's evaluation of him does not prove pretext." Id. (quoting Billet v. CIGNA Corp., 940 F.2d 812, 825 (3d Cir. 1991)).

Plaintiff also claims a reasonable jury could conclude Coltro placed Drummond on the 90-day Performance Improvement Plan four days after the Universal Services Supervisor position was posted, in order to "creat[e] a negative factor that Ms. Coltro 'legitimately' could take into account in selecting the successful candidate." (Plaintiff's Br. 10). This argument is unpersuasive. There is no evidence that Coltro even knew Drummond intended to apply for the promotion. Moreover, the record indicates that Coltro decided to place Drummond on the PIP as early as December 6, 2003, more than one month before the supervisor position was posted. (Ex. RR, Letter from Coltro to Drummond, dated December 6, 2003, discussing the performance improvement plan).

2. Termination

Plaintiff also claims PGW fired her because of her race. To establish a prima facie case of discriminatory discharge, Plaintiff must demonstrate: (1) she is a member of a protected class; (2) she was qualified for the position she held; and (3) she was fired (4) under circumstances that give rise to an inference of discrimination. See Waldron v. SL Indus. Inc., 56 F.3d 491, 494 (3d Cir. 1995). Drummond has not satisfied the fourth prong. "Common circumstances giving rise to an inference of unlawful discrimination include the hiring of someone not in the protected

class as a replacement[,] or the more favorable treatment of similarly situated colleagues outside of the relevant class," although neither circumstance is required to make out a prima facie case. Bullock v. Children's Hosp. of Philadelphia, 71 F.Supp.2d 482, 487 (E.D. Pa. 1999). In this case, Plaintiff has presented no evidence regarding her replacement, nor has she pointed to any other similarly situated employee who was treated more favorably. Moreover, the Court has carefully reviewed the record, and is unable to find any circumstance that would give rise to an inference of discrimination.

Even if Plaintiff could establish a prima facie case, we would still grant Defendant summary judgment. PGW has come forward with a legitimate, non-discriminatory reason for firing Plaintiff, and Plaintiff has failed to adduce sufficient evidence of pretext. Defendant asserts it fired Drummond because of her significant behavioral problems and failure to improve after being placed on the Performance Improvement Plan. Plaintiff claims PGW's reason is pretextual, and points to the "evidence of animus" between her and Coltro (discussed above), as well as several other workplace incidents which, in her opinion, demonstrate racial bias.[4] The incidents Plaintiff cites, however, are innocuous workplace interactions, and by no means discredit PGW's proffered reason for firing Drummond, or suggest that race more likely than not

[4] On one occasion, Coltro told Drummond if she was behind in her work, she did not have to work on cases from another department. Drummond said she thought this work was mandatory, and Coltro replied, "it's only common sense." Drummond testified that Coltro's attitude, tone of voice and demeanor in making this statement demonstrated she was a racist.

Another time, Drummond presented Coltro with a "Quick Reference Guide" she had compiled at Coltro's direction. At first, Coltro criticized the Guide because it contained certain information Coltro had asked Drummond to exclude. Coltro then changed her mind and said the Guide was acceptable, after Drummond explained that Leung told her to include this information.

motivated her discharge.

B. Retaliatory Firing

Plaintiff also contends PGW fired her in retaliation for filing internal and external complaints of racial discrimination. In order to demonstrate a prima facie case of retaliatory discharge, plaintiff must show: (1) she engaged in a protected activity; (2) she was discharged subsequent to or contemporaneously with such activity; and (3) there is a causal connection between the employee's protected activity and the discharge. Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1085 (3d Cir. 1996).

Plaintiff has established the first two elements of the prima facie case: she filed a complaint with PGW's EEO office on May 6, 2004, and the Philadelphia Commission on Human Relations ("PCHR") on May 28, 2004, and was discharged on June 11, 2004. With respect to the third element, Plaintiff claims the temporal proximity between her complaints of discrimination and termination establishes the requisite causal connection. We disagree.

There is no evidence (other than Drummond's testimony) that anyone at PGW knew about the PCHR complaint before Drummond was fired. In fact, correspondence between PCHR and PGW suggests that the complaint was not sent to Defendant until July 22, 2004 - more than one month after Drummond's discharge. (Ex. C). With respect to the internal complaint, it is undisputed that Coltro was aware of the complaint by May 12, 2004. (Ex. N). However, the fact that Plaintiff was fired one month after Coltro learned of this protected activity, without more, is insufficient to establish causation. See Weston v. Pennsylvania, 251 F.3d 420, 431 (3d Cir. 2001) ("With one exception, we have never held that timing alone can be sufficient to establish

causation."). This is particularly so in light of Plaintiff's continued, documented performance problems.

Even if we assume Plaintiff has established causation (and therefore a prima facie case), PGW has articulated a legitimate, non-discriminatory reason for its actions, which Plaintiff has failed to rebut with evidence of pretext. Plaintiff asks the Court to infer pretext because "[i]t is simply not reasonable to believe that Ms. Drummond's performance deteriorated so precipitously [after she complained of discrimination in May 2004] that she should be fired" one month later. (Plaintiff's Supplemental Letter Br. 2). However, Coltro's 90-day evaluation (which was issued before Drummond filed either complaint), described Drummond's behavior as "defensive and confrontational", and noted that her poor "attitude, unless improved, thwarts work growth." (Ex. W). There is also evidence that after Drummond complained of discrimination in May 2004, her behavior did, in fact, decline. For example, on May 12, 2004, Leung approached Drummond to discuss certain errors Drummond made entering information into PGW's billing system. Drummond admits she responded to Leung's criticisms by "shouting" at her supervisor. (Plaintiff's Response Statement of Facts, ¶ 116). We are unable to find pretext on this record.

C. Plaintiff's Remaining Claims

In her Complaint, Plaintiff also raised a hostile work environment and sex discrimination claim. (Complaint ¶¶ 43, 47, 54). Plaintiff did not address either claim in response to Defendant's Motion for Summary Judgment, nor did counsel mention them at oral argument. We assume Plaintiff is no longer pursuing these allegations. In any event, Plaintiff has not presented sufficient evidence to survive summary judgment on these claims.

V. Conclusion

For the reasons stated above, Defendant's Motion for Summary Judgment is granted. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LINDA DRUMMOND,	:	CIVIL ACTION
Plaintiff	:	NO. 05-5378
v.	:	
PHILADELPHIA GAS WORKS,	:	
Defendant	:	

ORDER

AND NOW, this 14th day of March, 2007, it is hereby ORDERED that Defendant's Motion for Summary Judgment (Doc. No. 18) is GRANTED. The clerk shall mark this case closed.

BY THE COURT:

/s/ Michael M. Baylson

Michael M. Baylson, U.S.D.J.